



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF A-, INC.

DATE: DEC. 6, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a wireless location technology company, seeks to permanently employ the Beneficiary in the United States as a transportation project engineer. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent residence.

The Director, Texas Service Center, denied the petition. The Director found that the Petitioner did not establish its ability to pay the proffered wage of the job offered from the priority date of the petition onward.

The matter is now before us on appeal. The Petitioner submits a letter and additional documentation, and asserts that it has established its ability to pay the proffered wage.

Upon *de novo* review, we will dismiss the appeal.

I. PROCEDURAL HISTORY

The Form I-140, Immigrant Petition for Alien Worker, was filed on April 6, 2016. As required by statute, the petition was accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), which was filed with the U.S. Department of Labor (DOL) on July 23, 2015, and certified by the DOL on January 5, 2016. In section G of the labor certification the Petitioner stated that the proffered wage for the job offered is \$91,333 per year. In section K of the labor certification the Petitioner stated that it has employed the Beneficiary since February 3, 2015.

As evidence of the Petitioner's ability to pay the proffered wage the Petitioner submitted copies of the following pertinent documentation with its Form I-140 and in response to the Director's request for evidence (RFE):

- Audited financial statements of the Petitioner as of December 31, 2014, and December 31, 2013, prepared by certified public accountants.

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- The Beneficiary's 2015 IRS Form W-2, Wage and Tax Statement, from [REDACTED] recording "wages, tips, other compensation" to the Beneficiary of \$77,602.46.
- Four earnings statements to the Beneficiary from [REDACTED] covering the 2-month period from mid-January to mid-March 2016, all stating that the Beneficiary's "pay rate" was \$90,000 annually.
- Two bi-weekly earnings statements to the Beneficiary from [REDACTED] issued in May 2016 showing that his "pay rate" was now \$92,000 annually.
- The Petitioner's payroll registers as of May 31, 2015, and December 31, 2015.
- Two sheets of figures which the Petitioner claims are its quarterly wage reports for the fourth quarter of 2015 and first quarter of 2016.
- Unaudited profit and loss statements for the Petitioner from January to September 2015 and from January to April 2016.
- Unaudited balance sheets for the Petitioner as of December 31, 2015 and April 2016.
- An unexecuted promissory note of the Petitioner with accompanying documentation of short term debt notes and a bank account with [REDACTED]

On June 14, 2016, the Director denied the petition on the ground that the Petitioner did not establish its continuing ability to pay the proffered wage of \$91,333 per year from the priority date (July 23, 2015) up to the present. The Director noted that the Petitioner had paid the Beneficiary \$77,602.46 in 2015, which was less than the proffered wage. The Director also referenced the Beneficiary's earnings statements, but noted that they did not cover the entire time frame from the priority date up to the present. The Director reviewed the Petitioner's audited financial statement for 2014, which recorded a net loss of \$238,771 in 2014 and net current liabilities that exceeded net current assets by \$6,027,645 in 2014. However, while the Petitioner had no net income or net current assets in 2014, its obligation to pay the proffered wage did not actually begin until the priority date of July 23, 2015. With regard to the Petitioner's bank account, the Director indicated that it could not be used to establish the Petitioner's ability to pay the proffered wage because the funds therein varied over time and did not demonstrate a sustainable ability to pay the proffered wage. Finally, the Director stated that the Petitioner's unaudited profit and loss statements were not persuasive evidence (a ruling that applies equally to the balance sheet statements) because they are the unsupported representations of management and do not comply with the requirement of 8 C.F.R. § 204.5(g)(2) that financial statements submitted as evidence of a petitioner's ability to pay the proffered wage be audited.

The Petitioner filed its appeal on June 23, 2016, accompanied by a letter and additional documentation consisting of the following:

- "Personalized total compensation statements" for the Beneficiary from [REDACTED] covering the earnings periods of February 14 to December 31, 2014, and January 15 to December 31, 2015.
- A 2015 IRS Form W-2 for the Beneficiary from [REDACTED] (already in the record).
- A payroll register statement from [REDACTED] to the Beneficiary dated December 29, 2015.
- Bank statements from [REDACTED] to the Petitioner for the months of December 2015 through April 2016.

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II. LAW AND ANALYSIS

The regulation at 8 C.F.R. § 204.5(g)(2) provides, in pertinent part, as follows:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records may be submitted by the petitioner or requested by the Service.

Thus, the Petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the labor certification application was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). In this case, the priority date is July 23, 2015.

The Petitioner must establish that its job offer to the Beneficiary is a realistic one. Because the filing of labor certification establishes a priority date for any immigrant petition later based on that labor certification, the Petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the Beneficiary obtains lawful permanent residence. The Petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); see also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, U.S. Citizenship and Immigration Services (USCIS) requires the Petitioner to demonstrate financial resources sufficient to pay the Beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will also be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the Petitioner's ability to pay the proffered wage, USCIS first examines whether the Beneficiary was employed and paid by the Petitioner during the period following the priority date. If the Petitioner establishes by documentary evidence that it employed the Beneficiary at a salary equal to or greater than the proffered wage, the evidence is considered *prima facie* proof of the Petitioner's ability to pay the proffered wage.

In this case, the Petitioner claimed in a letter that accompanied the Form I-140 that it has employed the Beneficiary since February 3, 2014, though the labor certification claimed that the Beneficiary had been an employee since February 3, 2015. Based on the pay records submitted, which date from February 2014, it appears that the earlier date is correct. Concerning the year of the priority date, the Petitioner submitted "personalized total compensation statements" from [REDACTED] according to which the Beneficiary's total compensation (consisting of regular pay, incentive pay, and total benefits) amounted to \$105,202.63 for the period of January to December 2015. The \$105,202.63 in 2015

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included total earnings of \$88,997.40 and total benefits of \$16,205.23. The submitted payroll register dated December 29, 2015 also reports gross earnings of \$88,997.40 for the Beneficiary in 2015. However, the Beneficiary's 2015 Form W-2 recorded "wages, tips, other compensation" totaling \$77,602.46.¹

On appeal, the Petitioner asserts that we should consider the amounts recorded on the payroll register and total compensation statement, rather than the amount recorded on the Form W-2, stating that the Beneficiary's "total cash compensation for 2015 was closer to \$89K."²

However, the Petitioner has not explained why the wages reported on the Form W-2 are over \$11,000 less than the wages reported on the total compensation statement for 2015. A Petitioner must resolve any inconsistencies in the record with independent objective evidence. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Here, it remains unclear what types of payments were included on the total compensation statement but were not reported as wages paid on the Form W-2. Moreover, the \$88,997.40 figure appears to include incentive pay or other discretionary payments. Per DOL regulations: "[t]he wage offered is not based on commissions, bonuses or other incentives, unless the employer guarantees a prevailing wage paid on a weekly, bi-weekly or monthly basis that equals or exceeds the prevailing wage." *See* 20 C.F.R. § 656.10(c)(2). In this case the Petitioner has not demonstrated that the incentive pay represents a guaranteed wage payment that can be considered part of the proffered wage. Finally, even if we accepted the Petitioner's claim that we should use the \$88,996.40 figure as the Beneficiary's actual pay in 2015, this amount is still less than the proffered wage of \$91,333.

Due to the inconsistencies in the documentation discussed above, we find that the Petitioner has not established that it paid the Beneficiary a salary greater than or equal to the proffered wage in 2015. Concerning 2016, the earnings statements appear to indicate that the Beneficiary's annual salary was \$90,000 at the beginning of the year, and rose to \$92,000 in May 2016, which exceeded the proffered wage. However, even if the Beneficiary has been paid above the proffered wage since May 2016, the Petitioner has still not established its continuing ability to pay the proffered wage from the priority date of July 23, 2015, onward based on wages actually paid to the Beneficiary.

If the Petitioner does not establish that it has paid the Beneficiary an amount at least equal to the proffered wage from the priority date onward, USCIS will examine the net income and net current assets figures entered on the Petitioner's federal income tax return(s),³ audited financial statement,

¹ The payroll register, total compensation statement, and Form W-2 were issued by [REDACTED] rather than the Petitioner. According to publically available information, [REDACTED] provides human resources and payroll services to small and midsize businesses. The Petitioner has submitted a number of documents from [REDACTED] which indicate that the Petitioner as the "company" or "pay group" on the statements. Therefore, it appears that [REDACTED] is likely a provider of payroll services to the Petitioner. However, this relationship is not explained in the record, and should be addressed by the Petitioner in any further proceedings before USCIS.

² This figure is presumably based on the total earnings figure on the personalized compensation statement and the gross earnings figure on the payroll register, both of which were \$89,997.40.

³ There is ample judicial precedent for determining a petitioner's ability to pay the proffered wage based on its federal income tax returns. *See e.g. Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Togatapu*

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or annual reports. If either of these figures equals or exceeds the proffered wage or the difference between the proffered wage and the amount paid to the Beneficiary in a given year, the Petitioner would be considered able to pay the proffered wage during that year.

In this case, the Petitioner has not submitted copies of any completed federal income tax returns, audited financial statements, or annual reports, as required by the regulations, for the pertinent years.⁴ Accordingly, the Petitioner has not established its ability to pay the proffered wage based on its net income or net current assets from the priority date onward.

The additional bank statements from [REDACTED] submitted on appeal, like the earlier ones, are not persuasive evidence of the Petitioner's ability to pay the proffered wage. We note that bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows submission of additional material "in appropriate cases," the Petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) – annual reports, federal tax returns, or audited financial statements – would be inapplicable or otherwise paint an inaccurate financial picture of the Petitioner. Bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. No evidence has been submitted to demonstrate that the funds reported on the Petitioner's [REDACTED] bank statements reflect additional available funds that were, or would not be, reflected on the Petitioner's federal income tax return(s), such as its taxable income (income minus deductions) or the cash specified on Schedule L that is considered in determining the petitioner's net current assets.

USCIS may also consider the totality of the Petitioner's circumstances, including the overall magnitude of its business activities, in determining the Petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612. USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of its net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the amount of compensation paid to officers, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage. A totality of the circumstances analysis also includes consideration of the Petitioner's wage obligations to other Form I-140 beneficiaries. In addition to the instant Beneficiary, the Petitioner must establish its ability to pay the proffered wages of all its other beneficiaries of immigrant petitions from the priority date of the instant petition until each beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2); *see also Matter of Great Wall*, 16 I&N Dec. at 144-145.

Woodcraft Haw., Ltd. v. Feldman, 736 F.2d 1305 (9th Cir. 1984)).

⁴ Even if the Petitioner were to establish that it paid the Beneficiary an amount equal to or greater than the proffered wage from the priority date to onward; the Petitioner must still submit at least one form of regulatory prescribed document (tax returns, audited financial statement, or annual report) for each year in question. Without such documentation, we cannot find that the Petitioner has the ability to pay the Beneficiary.

The Petitioner states that it has been in business since 2000 and had 20 employees at the time the instant petition was filed in April 2016. The audited financial statements in the record show that the Petitioner's net current liabilities were approximately \$5.5 million in 2013 and \$6 million in 2014. In those same statements the Petitioner showed net income of \$172,048 in 2013, but a net loss of \$238,771 in 2014. No financial data has been submitted for the years before 2013, and the unaudited balance sheets and profit and loss statements from 2015 and 2016 cannot reasonably be considered since they do not comply with the auditing requirement of 8 C.F.R. § 204.5(g)(2). Therefore, the Petitioner has not demonstrated a historic pattern of growth. Nor has the Petitioner identified any uncharacteristic business expenditures or losses in the years since the priority date. The record contains no evidence of the Petitioner's reputation within its industry.

Moreover, USCIS records show that the Petitioner filed five other Form I-140 immigrant petitions in 2014, and one in 2011. The Petitioner has provided no information about the current status of any of these petitions, the employment and immigration status of the beneficiaries, their proffered wages, or the wages paid to them since the priority date of the instant petition in 2015, as well as whether and when any of these beneficiaries acquired legal permanent resident status or ceased to work for the Petitioner. Without such information of its wage obligations to other I-140 beneficiaries, we cannot determine the Petitioner's ability to pay its other proffered wages since the priority date of the instant petition. In any further proceedings before USCIS the Petitioner must furnish the information discussed above relating to the beneficiaries of its other Form I-140 petitions.

Based on the evidence of record, therefore, we determine that the Petitioner has not established that the totality of its circumstances, as in *Sonegawa*, demonstrates its ability to pay the proffered wage of the job offered, in addition to the proffered wages due on all of its other Form I-140 petitions, from the priority date onward.

III. CONCLUSION

Based on the evidence of record in this case, we find that the Petitioner has not established its continuing ability to pay the proffered wage from the priority date of July 23, 2015, up to the present.

In visa petition proceedings, it is the Petitioner's burden to establish eligibility for the immigration benefit sought. See section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of A-, Inc.*, ID# 26830 (AAO Dec. 6, 2016)